SYKT. BATU SINAR SDN. BHD. & ORS.

v.

UMBC FINANCE BHD. & ORS.

HIGH COURT MALAYA, IPOH
PEH SWEE CHIN J
[CIVIL SUIT NO. 22-177-86]
7 JULY 1990

CONTRACT: *Sale of goods - Common law rule of nemo dat quod non habet - Exceptions to this rule - Definition of "possession" - Conduct of defendant - Legal duty of care to register title - Statutory requirement - Applicability of English common law - Sections 27, 30 Sale of Goods Act 1957 - Section 10(2), (3) of Road Traffic Ordinance 1958 - Section 3 Civil Law Act.*

CONTRACT: *Sale of goods - Failure to endorse claim on registration card - Legal duty - whether estoppel by conduct or negligence.*

CIVIL PROCEDURE: *Applicability of English common law rules to local conditions - Departure from - Section 3 Civil Law Act 1956.*

The 2nd plaintiff S bought a reconditioned tractor C, from the 3rd defendant for the purpose of leasing the tractor to the 1st plaintiff (lessee) for moving earth. The lease was for a period of 25 months with rent payable monthly by the 1st plaintiff to S.

C was seized by the 1st defendant who stated that it bought C from the 3rd defendant in order to hire to the 2nd defendant under a hire purchase agreement; the 2nd defendant fell into arrears but the 1st defendant could not locate him. The registration card of C was produced by S where it was stated that the registered first owner was the 3rd defendant, the second owner the 2nd plaintiff and the third owner the 1st plaintiff. The 1st defendant contended that it never authorised the 2nd defendant nor the 3rd defendant to sell C; the 1st defendant's name does not appear on the registration card.

The plaintiffs sought a declaration that the defendants were not entitled to C.

The issues argued before the Court were whether the conduct of the 1st defendant amounted to estoppel by negligence, whether the 1st defendant owed a duty to inform the rest of the world of its interest in C, whether negligence must be the proximate cause of the damage and the interpretation of ss. 27 and 30(1) of the Sale of Goods Act 1957 (the Act).

Held:

[1] Based on the definition of "possession" espoused in the *Pacific Motor Auctions* case, there was a break in the possession of C as the 3rd defendant delivered C to the 2nd defendant.

[2] On the evidence, there is no doubt that the 1st plaintiff had relied on estoppel by conduct and more specifically negligence of the 1st defendant thereby precluding the 1st defendant from denying the 3rd defendant's authority to sell C to the 1st plaintiff.

[3] The registration of claim to ownership by finance companies differs very significantly between the United Kingdom and West Malaysia; in the latter there is a statutory system or a quasi-statutory system - see s. 10(2) and 10(3) of Road Traffic Ordinance 1958. This created a legal duty of care.

[4] Since 1958, all buyers of second-hand cars have always depended on the absence of any registered endorsement of claim of ownership in the registration card as being free from any liability.

[5] Based on s. 3(1)(a) and (2) of the Civil Law Act 1956, the practice in West Malaysia combined with the statutory provisions of the Road Traffic Ordinance 1958 in regard to the registration of ownership claim, would constitute such a distinctive local circumstance of the local inhabitants of West Malaysia such that the decision of *Moorgate* and other cases directly and indirectly on the point of failure to have an ownership claim registered should not be followed. The Malaysian Courts have to develop their own common law by directing its minds to the "local circumstances" or "local inhabitants". *United National Finance Ltd. v. Industrial Resources Ltd.* applied and followed.

[Judgment for the plaintiffs]

Cases referred to:
Moorgate Mercantile Co. Ltd. v. Twitchings [1977] AC 890
United National Finance Ltd. v. Industrial Resources Ltd. [1986] CLJ (Rep) 795
Ng Ngat Siang v. Arab-Malaysian Finance Bhd. & Anor. [1988] 2 CLJ (Rep) 50
Pacific Motor Auctions Pty. Ltd. v. Motor Credits (Hire Finance) Ltd. [1965] AC 867
Tai Hing Cotton Mill Ltd. v. Lin Chong Hing Bank Ltd. [1986] AC 80
Public Textiles Bhd. v. L.L.N. [1976] 2 MLJ 58
Ong Lock Cho v. Quck Shin & Sons Ltd. [1941] MLJ 74
London Joint Stock Bank Ltd. v. Macmillan [1918] AC 777
Bishopgate Motor Finance Corp. Ltd. v. Transport Brakes Ltd. [1949] 1 KB 322
Coventry Shepherd & Co. v. Great Eastern Rail Co. [1883] 11 QBD 776
Donoghue v. Stevenson [1932] AC 502
Abigail v. Lapin [1934] AC 491

Legislation referred to:
Road Traffic Regulations 1956 [Brunei], reg. 47(1)
Civil Law Act 1956, s. 3(1)(a), (2)
Road Traffic Ordinance 1958, ss. 10(2)(a), (3)
Sale of Goods (Malay States) Ordinance 1957, ss. 27, 30(1)

For the plaintiffs - Abdul Rahim Noor (Paul Subramaniam with him); M/s. Maxwell, Kenion, Cowdy & Jones
For the 1st defendant - Lim Eng Hoe; M/s. Mah-Kok & Din

JUDGMENT

Peh Swee Chin J:

In this case, I declined to follow an English decision of the highest authority i.e. *Moorgate Mercantile Co. Ltd. v. Twitchings* [1977] AC 890 and other similar cases on a point which I considered, ought to be qualified *inter alia*, by the local circumstances long prevailing in the States of West Malaysia, and in doing so, I followed practically the judgment of High Court of Brunei Darulsalam in *United National Finance Ltd. v. Industrial Resources Ltd.* [1986] CLJ (Rep) 795, even though it was reserved by the Court of Appeal of Brunei Darulsalam.

The facts of the instant case which are common enough, were briefly as follows:

The 2nd plaintiff, *viz.* Supreme Leasing Sdn. Bhd. (hereafter called Supreme), in order to lease a reconditioned tractor used for moving earth to the 1st plaintiff (hereafter called the lessee), bought one from the 3rd defendant (hereafter called the tractor dealer), (and

the tractor so bought is hereafter called the Caterpillar). The leasing agreement was signed on 18 July 1984, for a period of 25 months commencing from this date at the monthly rent of RM7,838 payable by the lessee to Supreme which had bought it from the tractor dealer for RM165,000.

The original registration book or card (P2) of the Caterpillar was produced in Court by Supreme. It had the words in Bahasa Malaysia, *viz*. "Imported used vehicle. Both parties at the trial referred to it as an imported reconditioned vehicle. It had 8 rectangles or spaces, to provide for registration of names and addresses for owners in case of changes of ownership. Such a registration card is familiar to all car owners. The registered first owner was the tractor dealer, the second owner, Supreme, and the third or last owner, the lessee. In the case of one of the empty spaces under the heading of "For use of Road Transport Office only", was an endorsement or memorial with the words, *viz*. "Right of ownership is claimed by Supreme Leasing Sdn. Bhd." with the usual imprint of the rubber seal of Road Transport Department Johore. I will have more to say about the registration book.

The Caterpillar was on 10 February 1986 "repossessed" or seized, by the 1st defendant called the UMBC Finance Bhd. its former name being United National Finance Bhd. (hereafter called the UMBCF) Police reports were lodged by Supreme and the 3rd plaintiff, and this action was subsequently filed. UMBCF through its officer, stated that it bought the caterpillar from the same person, i.e. the tractor dealer for a sum of RM130,000 on 25 February 1984, in order to enter into a hire purchase agreement dated 25 February 1984, with the 2nd defendant, (hereafter called the hirer) for total purchase price of RM206,199.34 payable by monthly rental of RM199.84 for 54 months. When the hirer fell into arrears of rent for part of January 1986 and thereafter, UMBCF began to look for the hirer who seemed to have defied any attempt by UMBCF to trace him. It did manage to trace the missing caterpillar and repossessed it at Kampar. So far, all the facts stated were really not disputed. DW1, an officer of UMBCF, in charge of hire purchase transactions, gave further evidence as follows.

He deposed to the effect that since 1982, UMBCF had been dealing with the tractor dealer in respect of hire purchase transactions involving about RM3 million to RM4 million. He said UMBCF applied through the tractor dealer for the issue of registration book or card in respect of the caterpillar, but in almost the same breath, he said it was the hirer who so applied instead. The claim to ownership was made in the form of a letter sent to the tractor dealer for registration with Registrar and Inspector of Motor Vehicles (hereafter called the RIMV). It normally took 2-6 months for the RIMV to issue the registration card. UMBCF did not know the intention of the tractor dealer to resell the caterpillar to Supreme, and when it heard of the claim of Supreme; he said, the tractor dealer or its directors could not be traced by them and further its office was found to have been closed. He said further UMBCF did not authorize the hirer or the tractor dealer to sell the caterpillar.

In cross-examination, DW1 said neither UMBCF nor he had checked with the RIMV as to whether the caterpillar was registered with the RIMV or not. He said further, that after 6 months, UMBCF checked with the tractor dealer verbally only. He disagreed that UMBC or its officer did not take any steps during the said 2-6 months to ascertain if the caterpillar had been registered. When asked if UMBCF had been negligent, he said he was unable to comment on it.

References, to having the caterpillar registered in the evidence of DW1 must have been references to having the name of hirer registered as a owner, and the claim to ownership of the caterpillar by UMBCF registered by RIMV.

Both the hirer (2nd defendant) and tractor dealer (3rd defendant) did not appear and were not represented by Counsel.

It was submitted by learned Counsel for the Supreme & Lessee that UMBCF had conducted itself in such manner as to clothe the tractor dealer with such authority to dispose of this caterpillar to Supreme and to give a good title to Supreme. Section 27 of the Sale of Goods Act (Malay States) Ordinance 1957, (hereinafter called the Act) was cited in support and it could not be disputed that his clients had acted in good faith without notice of the UMBC's interest in the tractor.

It was submitted that the tractor dealer was the dealer of the Caterpillar and dealt with it in the ordinary course of business and entered into contracts in respect of it, and the tractor dealer was a mercantile agent.

It was further submitted that though consent was not given to the tractor dealer, UMBCF had put in the hands of tractor dealer, the registration card, and possession of the Caterpillar when Supreme acquired it. Lessee's employee (PW2) saw it at the premises of the tractor dealer. A couple of things could have been done to prevent a resale by the tractor dealer, it was submitted; the first was that UMBCF could have sent a notice to the tractor dealer asking the latter to explain for the delay in the registration, and if the explanation was not satisfactory, a report should have been lodged with RIMV of the purported claim. However, what the UMBCF did was merely to leave everything in the hands of the tractor dealer and this clothed the tractor dealer with authority without any reservation of any kind. This conduct precluded the UMBCF from denying the authority of the tractor dealer to sell the caterpillar to Supreme and s. 27 aforesaid therefore applied.

Next, it was submitted by learned Counsel for the Lessee and Supreme that s. 30(1) of the Act applied. He cited *Ng Ngat Siang v. Arab-Malaysian Finance* Bhd. & Anor. [1988] 2 CLJ (Rep) 50 in support. It was submitted that UMBCF had left the registration card with the tractor dealer, and the caterpillar was in possession of the tractor dealer, who delivered the caterpillar and there was no question of *mala fides* on the part of Lessee or Supreme. He cited an English case in *Pacific Motor Auctions Pty. Ltd. v. Motor Credits (Hire Finance) Ltd.* [1956] AC 867 to say that lack of legal title did not matter to Supreme if there was continuity of physical possession of the caterpillar by the tractor dealer for the purpose of s. 30(1) of the said Act. The continuity in possession commenced from the time UMBCF left the caterpillar in the possession of tractor dealer until Supreme took possession of it. Here the hirer took possession of the Caterpillar from UMBCF but there was no evidence of physical delivery to the hirer by the tractor dealer.

In reply learned Counsel for UMBCF submitted that in regard to s. 30(1) of the said Act, there was no evidence of continuity of possession. It was not pleaded that the caterpillar was, from February 1984 when UMBCF bought it up to the time of delivery in July 1984 to Supreme, in the possession of the tractor dealer. It was pointed out that D13, an acknowledgement of the delivery of the caterpillar by the tractor dealer to the hirer and addressed to the UMBCF, was evidence of physical delivery to the hirer. It was further pointed out PW3, an officer of Supreme, had told the Court that he did not know where the caterpillar was, prior to 18 June 1984 when Supreme paid the price to the tractor

dealer for the caterpillar. The plaintiffs had therefore failed to prove the continuity of possession for there was a break in such possession of the Caterpillar, as evidenced by D13, when the tractor dealer delivered the Caterpillar to the hirer. The *Pacific Motor Auctions Pty. Ltd.'s* case had interpreted s. 30(1). Section 30(1) therefore did not apply to the instant case.

On the question of s. 27 of the Act, i.e. as regards estoppel by negligence, there was no evidence in this case, that either the UMBCF consented to the tractor dealer, or gave authority to the latter to sell the caterpillar to Supreme. There must be some conduct. Here, learned Counsel submitted that the conduct in question was the failure by UMBCF to have the ownership claim endorsed on the registration card and to leave the matter in the hands of the tractor dealer, and his answer to this was that such failure did not amount to such conduct unless there was a legal duty to get the ownership claim endorsed. He cited *Tai Hing Cotton Mill Ltd. v. Lin Chong Hing Bank Ltd.* [1986] AC 80 and *Public Textiles Bhd. v. L.L.N.* [1976] 2 MLJ 58. There must be a representation and there must be a duty act. Counsel also cited *Ong Lock Cho v. Quck Shin & Sons Ltd.* [1941] MLJ 74.

Learned Counsel submitted that there was no duty on the part of UMBCF to inform the rest of the world of its interest in the Caterpillar by putting the endorsement of its ownership claims on its registration card. Further, the failure in fact did not mislead Supreme into buying the Caterpillar. There was no duty to put on such an endorsement and *Moorgate Mercantile Co. Ltd. v. Twitchings* [1977] AC 890 was relied on, and Counsel gave a summary of the facts in that case.

It was further submitted that UMBCF was careless as to itself, and it owed no duty of care to others and there was no system of registration in Malaysia. There was no obligation for RIMV to have an ownership claim endorsed on the registration card, but merely an *ad hoc* facility to finance companies, but without statutory provisions. Section 6(1) of Road Traffic Ordinance 1958 (which applied to this instant case, though since repealed) was cited, that the legal or actual owner was at the mercy of the hirer. There was no section dealing with such endorsement.

Learned Counsel further cited the judgment of Court of Appeal of Brunei Darulsalam in Civil Appeal No. 2/86, *viz. Industrial Resources Bhd. v. United National Finance Ltd. (being an appeal from the Resources Ltd.)* in which Roberts CJ sat in High Court as a Judge of first instance, and which was reversed.

Further, it was submitted that there was no duty of care of a person to take precaution in the management of his own business, and *London Joint Stock Bank Ltd. v. Macmillan* [1918] AC 777 was cited.

Further it was submitted that the negligence must be the proximate cause of the damage, thus as in *Tai Hing's* case, the negligence must be in the transaction itself, i.e. the forged cheque. Further even if there was a duty, there was no possibility of a representation because Supreme did not rely on the registration book, thus PW3, an officer then at the Supreme Court, only saw for the first time the registration card when the present action was filed. He did not have the information nor did he know if the search was made. It was lastly submitted that there must be the causation point, i.e. negligence must be the proximate cause of the damage. The decision of the Court of Appeal of Brunei Darulsalam *supra* was again cited and relied on.

At the end of submission, I gave judgment for the plaintiffs as prayed against the defendants and costs, the judgment including of course, "a declaration that all defendants are not entitled to the equipment", 'equipment' being the reference to the caterpillar referred to in the judgment.

I now deal with the core of my grounds of decision. Both UMBCF and Supreme were of course genuine purchasers and the villain of the piece was undoubtedly the tractor dealer who sold twice fraudulently the caterpillar.

Very significantly, s. 27 of the Act fell for consideration by the Court. Section 27 sets out as follows:

> Subject to the provisions of this Ordinance and of any other law for the time being in force, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell;
>
> Provided that where a mercantile agent is, with the consent of the owner, in possession of the goods or of a document of title to the goods, any sale made by him when acting in the ordinary course of business of a mercantile agent shall be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the buyer acts in good faith and has not at the time of the contract of sale notice that the seller has no authority to sell.

As is well known, s. 27 reiterates the common law rule of *nemo dat quod non habet*, the foundation of the law of sale of goods. As was observed very aptly by Lord Denning in *Bishopgate Motor Finance Corp. Ltd. v. Transport Brakes Ltd.* [1949] 1 KB 322, 336, in which his Lordship said:

> In the development of our law, two principles have striven for mastery. The first is for the protection of property; no one can give a better title than he himself possesses. The second is for the protection of commercial transactions; the person who takes in good faith and for value without notice should get a good title.

The second principle referred to must obviously refer to exceptions to the said common law rule or to s. 27 as found in other sections of the Act, such as ss. 30, 29 and others. It will be apparent that s. 27 itself contains 2 exceptions, one of which will be explained in detail later; i.e. that on account of the conduct of the owner (the real owner), he is precluded from denying the seller's authority to sell. This exception and s. 30(1) of the Act were the issues actively canvassed in this case. I shall deal with s. 30(1) first.

Section 30(1) sets out as follows:

> Where a person, having sold goods, continues or is in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge or other disposition thereof to any person receiving the same in good faith and without notice of the previous sale shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same.

The important part of s. 30(1) for the purpose of this case is "... having sold goods, continues or is in possession of the goods ..." The word, "possession" therein, has been interpreted by the Privy Council in *Pacific Motor Auctions* case to mean continuous

physical possession without a break after the sale of goods and up to the time of another or subsequent sale. Here D13 proved that there was such a break in the possession of the Caterpillar by showing the tractor dealer to have delivered the Caterpillar to the hirer to whom the Caterpillar was let on hire by UMBCF. The claim on the ground of s. 30(1) therefore failed.

On the ground of s. 27, from the evidence, and submissions, there could be no doubt that Supreme had relied on estoppel by conduct or more specifically, by negligence, of UMBC thereby precluding the latter from denying the tractor dealer's authority to sell the Caterpillar to Supreme.

Estoppel is of 3 kinds, *viz*. by record, by deed and by conduct. Estoppel by conduct can be subdivided, in some overlapping way, into estoppel by representation and by negligence. Estoppel by negligence was, from the evidence and submission, more relevant in this case. Professor Sir Rupert Cross, in his "*Evidence*" 4th Edn., at p. 304 says:

> "There is, however, a type of estoppel, often called estoppel by negligence, in which the party in whose favour it operates is the victim of the fraud of some third person facilitated by the careless breach of duty of the other party. An example is provided by *Coventry Shepherd & Co. v. Great Eastern Rail Co.* ([1883], 11 QBD 776). In that case the defendants carelessly issued two delivery orders relating to the same consignment of goods, thus enabling the person to whom they were issued to obtain an advance from the plaintiff, and the defendants were held to be estopped as against him from denying the fact that the goods mentioned in the order were held on behalf of the assignor. Someone who puts documents of this nature into circulation owes a duty to those into whose hands they may come.

The estoppel by negligence in this case was alleged to be the failure of UMBCF to take any steps for 6 months to ensure that the UMBCF"s claim to ownership to the caterpillar was registered or endorsed by the RIMV on the registration card of the caterpillar. In this connection, the tractor dealer sold it to UMBCF in February 1984 and again sold it to Supreme in July 1984. I mention this allegation so that the same could continue to be borne in mind in reading what I have to say further.

The registration of claim to ownership by finance companies differs very significantly between the United Kingdom and West Malaysia.

In England, there is the total absence of any statutory provision, or any facility given by any Government department dealing with registration and licensing of vehicles for the registration and or endorsement of such claim to ownership. Instead, it is believed that there is some sort of private arrangement among the finance companies themselves like what is stated in the reported case of *Moorgate Mercantile Co. Ltd.* case *supra*, in which there was a kind of private register for all hire-purchase transactions kept by a company set up as some sort of trade association of the finance companies called Hire-purchase Information Ltd., to which all members of the company had their hire-purchase transactions recorded there for the common benefit of all.

Further in that case, one McLorg, obtained possession of car from Moorgate on hire purchase, and there was a failure by Moorgate to register the hire purchase agreement with Hire Purchase Information Ltd. McLorg offered to sell to a dealer called Twitchings who bought it after finding no record of any prior hire purchase transaction in the files of Hire Purchase Information Ltd. Twitchings resold the car and on discovering the sale to Twitchings, Moorgate sued Twitchings for damages for conversion. The defence was

estoppel by negligence in the failure of Moorgate to have the prior hire-purchase agreement with McLorg registered with the Hire Purchase Information Ltd. The claim found its way to the House of Lords where 5 learned Law Lords by a majority of one, i.e. by 3 to 2 majority, allowed the claim of Moorgate. The facts in that case are similar to the facts in the instant case and also those in the *United National Finance Ltd. v. Industrial Resources Ltd.* [1986] CLJ (Rep) 795.

In the *Industrial Resources Ltd.* case, Industrial bought a BMW from a dealer and let it on hire purchase to one Martin by a hire-purchase agreement on 19 August 1983. Though Martin's name was subsequently registered on the registration card as owner but there was a failure to register the claim by Industrial to ownership of the BMW on the registration card. Industrial had merely sent an employer to see if the registration card was ready for collection. Martin fraudulently obtained a loan of RM30,000 from United Finance in the form of sale by Martin to United Finance and re-letting by United Finance to Martin with the United Finance's ownership claim recorded this time in the registration card by the vehicle registering authority. Industrial repossessed the car on Martin's default of payment of instalments. United Finance then sued Industrial for a declaration that the BMW was its property. Roberts CJ held to the effect that Industrial was estopped by its own negligence in failing to register earlier a ownership claim on the registration card and his Lordship distinguished the facts there from the case of *Moorgate, supra*, by referring to Brunei's Road Traffic Regulations 1956, reg. 47(1) which is set out below:

> Where the person entitled to the possession of a motor vehicle or trailer is not the absolute owner thereof, but is registered as the owner thereof, any person claiming to be the absolute owner thereof (hereinafter called 'the claimant') may apply to the licensing officer of the district in which the vehicle or trailer is registered to enter his name in the register as the absolute owner in addition to the name of the registered owner.

The learned Judge further held: "Thus I find that in Brunei, by reason of the different legislation and practice in force for 30 years, there is a duty which differs from that which exists in England, namely to take reasonable steps to register a claim to ownership of a motor vehicle. He gave judgment to United Finance against Industrial.

On appeal, the Court of Appeal of Brunei Darulsalam reversed the judgment of Roberts CJ and dismissed the claim of the United Finance instead. After a review of various English cases including the *Moorgate* case, it held to the effect that the failure to register in that case, the ownership claim would not amount to estoppel by negligence, unless there was a legal duty to do so and not a mere social or moral duty, or a "long usage resulting from a misunderstanding of the intended effect of reg. 47(1) of the Brunei's Road Traffic Regulations 1956.

Reverting back to the difference between United Kingdom and West Malaysia on the question of the registration of the ownership claim, the registration system would appear to be some sort of private arrangement among the finance companies as described in *Moorgate* case in the United Kingdom. In West Malaysia, however, it is a statutory system or at least a quasi-statutory system.

Our law recognizes because of hire purchase or leasing transactions, that more than one party can claim to be owner of a motor car. One who is entitled to possession or immediate possession is entitled to be registered as owner and such "owner" is liable to the authorities for carrying out all provisions of road traffic or road transport legislation, viz. in the instant case, the Road Traffic Ordinance 1958, (since repealed). However, s. 10(2)(a) and s. 10(3) of this Ordinance had a crucial role to play in this case.

Section 10(2)(a) and s. 10(3) are set out below:

> 10 (2) Where 2 or more persons have or claim possession and use of a motor vehicle, the Registrar shall register as the owner of the motor vehicle:
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> (a) such one of those persons as may be nominated by them in the prescribed manner for the purpose of such registration; or
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> (b) ...
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> (3) In any case referred to in para. (a) of subsection (2) of this section the Registrar may also enter in the register and in the registration book the names of the other claimants to the ownership of the motor vehicle, but no such entry of the name of any claimant shall be deemed to affect and liability which the person registered as owner may incur under any of the provisions of this Ordinance or any rules made thereunder, or to vest in such claimant any of the rights or powers conferred by this Ordinance on the registered owner of a motor vehicle.

The above statutory provisions did not apparently find their counterpart in the United Kingdom's Road Traffic Act.

I found myself in entire agreement with the conclusion of Roberts CJ in the *Industrial Resources* case, *supra*, when he found estoppel by negligence by relying on the Brunei's Road Traffic Regulations in question and the practice there for 30 years in question. I would not follow the decision of Brunei's Darulsalam's Court of Appeal in this regard for the reasons to be given below.

First, their Lordships seemed to hold that the Road Traffic Regulations in question did not create a legal duty of care as opposed to a "social and moral duty". The House of Lords in *Donoghue v. Stevenson* [1932] AC 502 has made it abundantly clear in my opinion, that if any person can reasonably forsee that his act or omission is likely to cause damage or injury to any other person, he should take steps or precaution to avoid such act or omission, (the snail in the ginger ale bottle in that case being just an example), no question of statutorily created duty of care need pre-exist.

The failure to carry out the practice of registering an ownership claim on the registration card would create the necessary expectation in the mind of a subsequent unknowing buyer of the car, or the necessary representation to him with regard to the status of the car. Such consequence cannot be lost on the mind of any finance company acquiring a car to have it let on hire to any hirer. It is inconceivable that it cannot be reasonably foreseen.

I would like to express my opinion on the "practice for 30 years" in Brunei alluded to by Brunei Darulsalam's High Court and disregarded by its Court of Appeal, suggesting, I believe, that such practice was "a long usage resulting from a misunderstanding of the intended effect of reg. 47(1)."

Since 1958, i.e. the coming into force of Road Traffic Ordinance 1958 at any rate, if not since the end of the Second World War, all buyers of second-hand cars in West Malaysia have always depended on the absence of any registered endorsement of claim of ownership in the registration card as a green light to deal with sellers whose names are registered as owners on the registration cards or their mercantile agents. By and large, a great deal of fraudulent "double-selling" has been avoided. All such buyers have come to regard the absence of registration or endorsement of claim to ownership as showing a car to be free from any hire purchase liability. This practice, of course, has been assisted no doubt by the system of registering the same made available by RIMV in each state

in West Malaysia based no doubt on the statutory provisions, such as s. 10(2)(a) and s. 10(3) of the Ordinance. It is interesting to note that s. 10(2)(a) and s. 10(3) have been reenacted and continued in the Road Transport Act 1987 which replaced the Ordinance.

Now under our Civil Law Act 1956, ss. 3(1)(a) and 3(2) provide as follows:

> 3. (1) Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the Court shall:
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> (a) in West Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on 7 April 1956;
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> (b) ...
>
> (c) ...
>
> Provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary.
>
> (2) Subject to the express provisions of this Act or any other written law in force in Malaysia or any part thereof, in the event of conflict or variance between the common law and the rules of equity with reference to the same matter, the rules of equity shall prevail.

I ought to emphasize the proviso to s. 3(1)(a). I concluded that the practice in West Malaysia described above, combined with the statutory provisions of the Road Traffic Ordinance 1958 in regard to the registration of ownership claim, would constitute such a distinctive local circumstance of the local inhabitants of West Malaysia that the decision of *Moorgate* and other cases directly and indirectly on the point of failure to have an ownership claim registered should not be followed. We have to develop our own common law just like what Australia has been doing by directing our minds to the "local circumstances" or "local inhabitants".

It remains for me to deal with certain connected specific points raised; out of deference to rather elaborate arguments on them, with which I was unable to agree however.

Learned Counsel for Supreme submitted with reference to the proviso to s. 27 of the Act, and learned Counsel for UMBCF did not deem it fit to reply thereto, quite rightly in my opinion. It was submitted that the tractor dealer, being a mercantile agent, thus sold the Caterpillar and I suppose, validly. Bearing the words of the proviso in mind, it was never the case and there never was the evidence that the Caterpillar was in the first place left with the tractor dealer with the consent of UMBCF.

Learned Counsel for UMBCF raised the point to the effect that his client's negligence, was not the proximate cause of the damage. Please refer to his submission quoted above. In my view, the damage, of course, should refer to the adverse claim of UMBCF against Supreme and the subsequent seizure of the Caterpillar. It would not be wrong to say that if there was an ownership claim registered or endorsed on the registration card, the tractor dealer would not have the gall or the legalistic cover to carry into effect a well-concealed fraud, for to do so in face of the endorsement would result in an arrest and prosecution of its officers concerned, with the police not requiring at all any lengthy investigation. It is interesting to observe by way of comparison that in *Abigail v. Lapin* [1934] AC 491, a land case on appeal from Australia with which we all are familiar, the

failure of Abigail to make a search for any caveat which Lapin in fact failed to lodge, did not stop their Lordships in the Privy Council when giving judgment for Abigail, from holding that the Lapins had neglected "the well-known method of protecting their rights and interests by means of a caveat."

For the reasons given above, the Court gave judgment to Supreme (2nd plaintiff) and other persons claiming through it, *viz.*, the other plaintiffs with costs. The only regret the Court had was having to give judgment against a Counsel who had prepared his case so exceptionally well.

Also found at [1990] 2 CLJ 691